

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHN TENNISON,

No. C-04-0574 CW (EMC)

Plaintiff,

v.

**ORDER DENYING DEFENDANT'S  
MOTION FOR SANCTIONS**

CITY & COUNTY OF SAN FRANCISCO, *et al.*,

**(Docket No. 515)**

Defendants.

For the Northern District of California

On October 12, 2006, third party Caramad Conley filed a motion for permissive intervention and to modify the protective order in this case. Defendant the City and County of San Francisco filed a statement of nonopposition to the motion but asked the Court to bar Keker & Van Nest from representing Mr. Conley because it had violated the protective order in this case by using material produced in this case to evaluate Mr. Conley's case. The Court therefore deemed the City's nonopposition as a motion for sanctions and thereafter set a briefing schedule. The hearing on the motion for sanctions took place on December 6, 2006. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel at the hearing, the Court hereby **DENIES** the City's motion for sanctions.

The City's argument that Keker violated the protective order in this case is not without some merit. The protective order does specify that documents covered by the protective order are to be used for the purposes of this litigation only, and there is no real dispute that Keker used the confidential *Tennison* documents to evaluate Mr. Conley's case. *See Opp'n* at 2.

1 The Court does not agree with Keker's argument that, under *Foltz v. State Farm Mutual*  
2 *Automobile Insurance Co.*, 331 F.3d 1122 (9th Cir. 2003), "a [collateral] litigant must review and  
3 analyze the documents he seeks to use." Opp'n at 1. *Foltz* does not require such a specific showing  
4 in order to obtain relief from a protective order. Under *Foltz*, the court which issued the protective  
5 order makes "only a rough estimate of relevance" in determining whether to grant relief therefrom,  
6 with "the ultimate discoverability of specific materials covered by the protective order [being]  
7 resolved by the collateral court[]." *Foltz*, 331 F.3d at 1133. "[R]elevance hinges 'on the degree of  
8 overlap in facts, parties, and issues between the suit covered by the protective order and the collateral  
9 proceedings.'" *Id.* at 1132. If attorneys in collateral litigation believe that confidential information  
10 in matters covered by a protective order is relevant to their case, those attorneys should move for  
11 relief and demonstrate general relevance based on the degree of overlap in facts, parties, and issues  
12 between the two lawsuits. Review of particular documents under seal is generally not necessary.

13 Keker argues that it cannot be held to have breached the protective order when there was no  
14 way for it to avoid a breach -- by happenstance it represents both Mr. Tennison and Mr. Conley. The  
15 Court acknowledges that this fact complicates matters. However, even though Keker represents both  
16 Mr. Tennison and Mr. Conley, there are different Keker attorneys working on each case. *Foltz*  
17 requires that Mr. Conley's attorneys move this Court for relief from the protective order before  
18 obtaining information from the *Tennison* attorneys.

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1           Nonetheless, even assuming that there was a breach of the protective order, the draconian  
2 sanction sought by the City -- *i.e.*, disqualification of Kecker in the *Conley* case -- is not warranted.  
3 There is nothing to indicate that any breach of the protective order was done in bad faith. More  
4 important, any purported breach has not prejudiced the City. Accordingly, the Court denies the  
5 City's motion for sanctions.

6           This order disposes of Docket No. 515.

8           IT IS SO ORDERED.

10          Dated: December 8, 2006

  
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EDWARD M. CHEN  
United States Magistrate Judge